United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-7042

(42043)

To be argued by
NINA G. GOLDSTEIN

United States Court of Appeals

For the Second Circuit

ELLIOTT H. VELGER,

Plaintiff-Appellant,

against

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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APPELLEES' BRIEF

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APPELLEES' BRIEF

Preliminary Statement

This appeal was taken from an order and judgment of the United States District Court for the Southern District of New York (WERKER, D. J.), entered December 10, 1974, granting judgment for the defendants on all issues (151a).*

* Unless otherwise indicated, numbers in parentheses refer to pages of the Appendix.

Issue Presented

In this proceeding brought pursuant to 42 U.S.C. §1983, the appellant, a former New York City probationary police officer, whose employment was terminated without his having been afforded a hearing as to the reasons for his termination, seeks *inter alia,* reinstatement and damages for alleged injury to his reputation. A hearing was held on the question whether the Police Department had stigmatized him so as to foreclose him from other job opportunities. It was testified to at that hearing, and found as a fact by the District Court, that he had been terminated from a job as a Penn Central security officer after a Penn Central Captain, with the plaintiff's authorization, saw his personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt. The District Court also found that background information on employees is available to governmental police agencies and information as to why the employee was terminated is available to them informally.

It is our position that the Court below correctly concluded that the plaintiff did not sustain his burden of proof. He did not establish that the Police Department publicized or circulated the information at issue, that it was released to any of the governmental agencies for which he applied for employment or even that any of those agencies had refused to hire him.

It is the appellant's position that his termination from employment as a probationary patrolman in itself constitutes a stigma amounting to a violation of his constitutional

rights. It is also apparently his position that the existence of the statement in his file, even absent his meeting the burden of proof set forth by the District Court, is sufficient to warrant relief.

Facts

Appellant Elliott Velger was appointed as a probationary patrolman on August 15, 1972 (21a). The Police Commissioner, having found his performance unsatisfactory, ordered his services terminated effective February 16, 1973 (10a). In accordance with standard procedures as to probationary employees, appellant did not receive a hearing prior to dismissal nor was he apprised of the reasons for his termination (6a).

On May 25, 1973, appellant commenced this action in the United States District Court for the Southern District of New York to have his dismissal vacated and annulled, to enjoin the defendants from refusing to employ him and for damages caused by injury to his reputation (8a-9a). Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (12a-13a). In July, appellant moved for an order convening a three-judge court to declare section 63 of the New York State Civil Service Law, which mandates probationary periods for employees, unconstitutional (14a).

Judge GURFEIN denied the motion to convene a three-judge court on the grounds that substantial questions of constitutionality were not included in the complaint and because the Second Circuit, in *Russell* v. *Hodges*, 470 F. 2d

212, 218 fn. 6 (1972), had already decided that appellant's contention was "frivolous" (31a). He determined that appellant, as a probationary, had no property interest in not being terminated such as would require a hearing, but he refused to dismiss the complaint absent a showing that appellant's name had not been placed on a list which disqualified him from competing in Civil Service examinations for one year as appellant had contended in his fourth cause of action (35a). Judge GURFEIN concluded that a showing by affidavit that appellant had not been so foreclosed from other employment opportunities "may suffice for summary judgment without a trial" (36a).

Following the filing of affidavits, in which appellant charged that he had been denied employment opportunties because of derogatory material in his personnel file, which he has never seen or been allowed to refute, Judge GURFEIN denied defendants' motion for summary judgment and allowed appellant to amend his complaint to incorporate the substance of the affidavit (45a).

Interrogatories were exchanged and on November 25, 1974, a hearing was held before Judge WERKER on the issue of whether appellant had been stigmatized and foreclosed from employment opportunties because of the personnel file compiled by the Police Department. The testimony adduced at the hearing is substantially as related in Appellant's Brief. What the appellant complains of in his personnel file is a statement that he put a gun to his head in an apparent suicide gesture (117a-118a).

Opinion Below

The Court found the following facts (149a-150a):

"Plaintiff served in the New York City Police Department as a police trainee from January 31, 1970 to August 15, 1972, a few days after his 21st birthday, when he was appointed a probationary patrolman. Six months later, by letter dated February 8, 1973, the Police Department discharged him. The letter indicated that the Department 'has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner.'

After termination plaintiff applied for security officer positions in the private sector, and took civil service examinations for both state and federal government service, passing 97% of them. He was subsequently interviewed for several of the civil service positions, but not recalled. On each application form, where asked to state whether he had ever been dismissed by an employer, plaintiff indicated his Police Department dismissal.

One of the private sector jobs plaintiff sought was that of security officer with the Penn Central Railroad. After placing fourth in a field of 20 applicants tested, he was hired by the railroad for a probationary period on September 10, 1973. During the probationary period he was asked to sign, and did sign, a release form authorizing Captain Lonnie Hamilton of the Penn Central police to review his New York City Police Department records, and waiving any claims he might have against the Department for allowing Captain Hamilton to see them.

The Police Department refused to release any information about Mr. Velger to Captain Hamilton by letter.

When he phoned, he was informed that only if he were to present the waiver letter in person, in New York, would he be allowed to examine Mr. Velger's file. On doing so Captain Hamilton was given the personnel file, from which he gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt.

Captain Hamilton tried to verify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In light of his previous failure to obtain information by letter, Captain Hamilton declined to pursue the matter further; he returned to the Penn Central and recommended that Mr. Velger be terminated. This was done on November 11, 1973.

The unwritten policy of the present administrative manager of Police Department personnel files is that no information whatsoever is released about former employees to any one in the private sector. (No evidence was introduced as to the policy of his predecessor during the time period in issue.) Unwritten policy with respect to government police agencies is that background information on former employees is available to those agencies as a matter of course. Although information as to why an employee was discharged is not formally available to such agencies, it appears to be possible for them to obtain it informally."

On the basis of these facts the Court concluded that the appellant:

"has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police rec-

ord was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof."

ARGUMENT

The appellant had no property right in his employment as a probationary patrolman. As to whether he was stigmatized, and denied a right to liberty, by the release of his personnel file to prospective employers, the Court below correctly concluded, on the basis of the evidence before it, that the appellant failed to meet his burden of proof.

Although this appeal was taken from the order and judgment of the Court below (WERKER, D. J.), entered after a hearing on the limited issue of whether or not appellant could establish such stigma as would foreclose future employment opportunities, much of the appellant's brief is devoted to the claim that appellant had a property right in his position with the Police Department by virtue of his having been appointed a police trainee in January, 1970, and his having served in that capacity until his appointment as probationary patrolman in August, 1972. We submit that then District Judge GURFEIN's decision of October 31, 1973 (34a) that no property interest has been established is dispositive of this point. Appellant's entire "property" claim was based on one sentence in the police trainee examination announcement which said, "A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practi-

cable without taking any further written or physical tests, provided he has a satisfactory record as a trainee and provided he passes a medical test identical to the one given to Patrolman candidates'' (22a).

The Court correctly found this claim to be totally without merit since all regular civil service appointments are made subject to a probationary period by Section 63 of the New York State Civil Service Law and because, in the same announcement relied upon by appellant, it is clearly stated (22a):

> ''Those appointed as probationary Patrolmen must serve a probationary period as provided in the Rules of The City Civil Service Commission existing at the time of appointment.
>
> A police trainee will not be considered a member of the uniformed force or a peace officer.''

That appellant when terminated had no tenure is beyond dispute. See *Russell* v. *Hodges,* 470 F.2d 212 (2d Cir. 1972).

Likewise, the appellant's claim that his mere termination as a patrolman ''gave rise to a stigma of criminality'' (App. Br., p. 11) is unsupportable. There is no reason, in law or in common experience, for anyone to assume that a patrolman's termination from probationary service was the result of criminality as opposed to the countless numbers of other possibilities, such as incompetency of various sorts or medical problems which bear no stigma.

The issue that remains to be determined is whether or not appellant has suffered a deprivation of liberty due to his alleged foreclosure of employment opportunities as a result of a stigma imposed upon him by divulgence of information in his Police Department personnel file.

Board of Regents v. *Roth,* 408 U.S. 564 (1972), and the cases following *Roth,* such as *Lombard* v. *Board of Education,* 502 F. 2d 631 (2d Cir. 1974), did not confront the specific circumstances involved herein. In *Lombard,* a circular was sent by the Board of Education to school principals directing them not to hire the appellant, a dismissed probationary teacher, who was determined to be paranoid after being forced to submit to a medical examination. This Court noted that the charge of mental illness was "purportedly supported by a finding of an administrative body" and held that Lombard had been improperly "deprived of his reputation as a person who was presumably free from mental disorder" without an opportunity to confront those who made the determination. 502 F.2d at pp. 637-638.

Here, in contrast, no reason was given for the appellant's termination and there was no effort on the part of the Police Department to blacklist him or to publicize or circulate derogatory information about him.

The only release of information established by the plaintiff was a release which he himself admittedly authorized.* We submit that, having authorized the release, the appellant now has no constitutional complaint with respect to the result which flowed from that release and which involved a decision not by the Police Department, but a private employer.

* We are not unmindful of the implications under *Roth* of disclosure of such information without authorization. A directive from Police Commissioner Michael J. Codd, dated April 2, 1975, which is annexed to this brief, states that: "In any case where a probationary employee of this Department is terminated, access to his personnel file by any prospective employer, private or governmental, will be granted only upon the probationary employee executing a written authorization for such prospective employer to inspect his file."

In addition, in *Lombard,* the Court noted that "the record demonstrates" the harm to Lombard's employment opportunities. 502 F. 2d at p. 637. Lombard showed that "he was unable to obtain continuous employment, and, indeed, several schools were forced to dismiss Lombard because of the Board's circular." 502 F. 2d at p. 634. Here, in contrast, the plaintiff failed to establish either that other employers had seen the material complained of or that he had been denied jobs because of it.

We submit that neither *Roth* nor the cases following *Roth* establish that the mere existence of possibly stigmatizing material in an employee's personnel file gives rise to a constitutional violation in the absence of a hearing. Nor, we submit, should the cases be so extended. The appellant in this case failed to meet his burden of proving that a stigma foreclosing him from further job opportunities actually attached to the presence of the material in his file. For this reason his constitutional claim must be dismissed.

CONCLUSION

The order and judgment appealed from should be affirmed, with costs.

April 4, 1975.

Respectfully submitted,

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L. Kevin Sheridan,
Nina G. Goldstein,
Diane R. Eisner,
of Counsel.

POLICE DEPARTMENT DIRECTIVE

The City of New York

POLICE DEPARTMENT

NEW YORK, N.Y. 10013

April 2, 1975

Memorandum To: Chief of Personnel, Corneilus J. Behan

From: Police Commissioner, Michael J. Codd

Subject: ACCESS TO PERSONNEL FILES OF PROBATIONARY EMPLOYEES.

In any case where a probationary employee of this Department is terminated, access to his personnel file by any prospective employer, private or governmental, will be granted only upon the probationary employee executing a written authorization for such prospective employer to inspect his file.

Michael J. Codd
POLICE COMMISSIONER

MLL:kl

3 copies rec'd
Friday April 4 - 75 -

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pltf - appellant